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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No.....

ROBERT F. HARDY and MARY J. HARDY, his wife, MILES CITY BANK, a State Banking Corporation; and ARTHUR T. McINTOSH, Individually and as Trustee,

Petitioners,

vs.

EULA MAY IVINS, as Executrix of the Will of R. L. Ivins, Deceased and EULA MAY IVINS,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Montana

TO THE HONORABLE CHIEF JUSTICE AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a Writ of Certiorari issue to review the judgment of The Supreme Court of the State of Montana, which affirmed a judgment of the District Court partitioning real property.

OPINIONS BELOW

The majority opinion of the Supreme Court of Montana (infra appendix pp. 1-21) is reported in the Pacific Reporter Advance Sheets at 333 P. (2d) 471; the dissenting

opinion (infra appendix pp. 22-23) is reported at 333 P. (2d) 480; the dissenting opinion on the order denying a rehearing (infra appendix pp. 24-27) is reported as 334 P. (2d) 721.

JURISDICTION

The decision of the Supreme Court of Montana was rendered on November 21, 1958. A petition for a rehearing, filed within the time allowed by order of the Supreme Court, was denied on January 19, 1959. (appendix p. 39.)

The Jurisdiction of this Court is invoked under title 28, United States Code, Section 1257, which provides in part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * *
>
> "(3) By writ of certiorari, where the validity of a * * * statute of the United States is drawn in question * * * or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The Supreme Court of the State of Montana is the highest court of the State, Constitution of Montana, Article VIII, Sec. 2.

The Judgment of the Supreme Court was the decision rendered on November 21, 1958, State ex rel. Dolenty v. District Court, 42 Mont. 170, 111 Pac. 731; State ex rel. Clark v. District Court, 103 Mont. 145, 61 P. (2d) 836.

Rule XV of the Rules of the Supreme Court of Montana authorizes the filing of petitions for rehearing. Rule XXI of the Rules of the Supreme Court of Montana provides that

Remittitur shall not issue until expiration of the time for filing a petition for rehearing or if a petition for rehearing be filed until the denial thereof.

The decision of the Supreme Court was not final until the Order of the Court was entered denying the petition for a rehearing. Conway v. Fabian, 108 Mont. 287, 89 P. (2d) 1022, Department of Banking v. Pink, 317 U. S. 264, 87 L. Ed. 254, 63 S. Ct. 233.

QUESTIONS PRESENTED

Whether in a partition of a stock ranch when six times more Taylor Grazing land is treated as allotted to one co-owner than to the other, but the one to whom the greater share of permit lands is assigned is deemed to have thereby received property of a value equivalent to 75% of the value of lands of equal carrying capacity owned in fee, a confiscation of his property is effected without due process of law in violation of the due process clause of the Fourteenth Amendment.

Whether a judgment violates the Act of Congress known as the Taylor Grazing Act which in effect partitions lands under the jurisdiction of the Secretary of the Interior, who may issue revocable grazing privileges for the lands only.

Whether where two co-tenants have equal rights in a Taylor Grazing License to public lands of the United States, issued under the Taylor Grazing Act, Sec. 315b, Title 43 U. S. C. a division of fee lands which assumes the federal permit lands will be allotted as recommended by Referees

on partition illegally deprives the petitioner of his undivided one-half interest in grazing privileges on all of the government lands in violation of the Act of Congress.

STATUTES AND REGULATIONS INVOLVED

The applicable Federal Statute and Regulations and Montana Statutes are: Taylor Grazing Act, June 28, 1934, 48 Stat. 1270 as amended Aug. 6, 1947, 61 Stat. 790 (43 U. S. C. A. Sec. 315 et. seq); R. C. M. 1947 Sections 91-432, 93-6319, 93-6321, 93-6322, 43 C. F. R. § 161.7, § 161.2 (k) (1), § 161.6 (e). Their pertinent text is set forth in the appendix, (pp. 40-42A)

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in part: (U. S. C. A. Const. Amend. 14, Sec. 1)

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

R. E. Ivins and Robert F. Hardy were the owners as tenants in common of a stock ranch in Montana comprising, with leased and Taylor Grazing lands, more than two hundred sections or in excess of 130,000 acres.

R. L. Ivins and Eula May Ivins, his wife, plaintiffs brought an action in the District Court of Custer County, Montana, against Robert F. Hardy and Mary J. Hardy, his wife, and certain mortgagees, defendents, to partition the ranch.

The District Court of Custer County entered an Interlocutory Decree confirming the referees' report proposing a division of the ranch. The defendants Robert F. Hardy, et al. appealed to the Supreme Court of Montana from the decree.

The majority opinion of the Supreme Court held that the evidence supported confirmation of the referees' report for division of the ranch based on the animal-unit method of valuation with allowance made for the value of federal and state grazing permits to adjoining lands.

Ivins is now deceased and his interest is represented by Eula May Ivins, Executrix. (Appendix p. 34.)

In the decision of the Montana Supreme Court the parties are identified as follows:

> "Hardy is the principal defendant and principal appellant, and will be treated as such. For convenience, Ivins will be treated as plaintiff and respondent, rather than his executrix, who has been substituted for him."

Here Hardy is the principal petitioner and hereafter is referred to as Petitioner while Ivins' executrix is referred to as Respondent.

The material facts giving rise to the federal and constitutional contentions raised by this petition for a writ of certiorari are not in dispute, and are referred to in the opinion or dissenting opinions rendered in the Supreme Court of Montana.

The Montana Statutes provide that Referees on partition "must divide the property and allot the several portions thereof to the respective parties, quality and quantity rela-

tively considered." (§ 93-6319 R. C. M. 1947) (appendix p. 41.) "The Court may confirm * * * the report * * *. Upon the report being confirmed, Judgment must be rendered that such partition be effectual forever * * *" (§ 93-6322 R. C. M. 1947) (Appendix p. 41.)

The referees' report contains a summary of their findings set forth as a schedule in the majority opinion. (333 P. (2d) 474), (infra appendix p. 32.)

The referees appraised all of the lands of the ranch by determining the carrying capacity of each section in animal units. An animal unit is defined by Montana statute as one cow, one horse, five sheep or five goats. 'Carrying capacity' is defined as the number of animal units which a given tract will support for a twelve month's period. (R. C. M. 1947, Sec. 81-432. Appendix p. 41.) In one instance the referees converted carrying capacity in animal unit values to dollar values giving a value of $305.88 to an animal unit.

The referees' report valued 55,632.40 acres of fee land assigned to Ivins as 1627.48 animal units, which would be, if converted into money, using their dollar value of an animal unit, a value of $489,993.58.

The report valued the 51,730.57 acres of fee land assigned to Hardy as 1370.19 animal units which, if converted into money values, would amount to $419,278.14.

In other words, upon the face of the report the value of Respondent Ivins' share of deeded or fee land exceeds the value of Petitioner Hardy's share of deeded by $70,715.44.

THE FEDERAL QUESTIONS WERE RAISED IN THE TRIAL COURT AND IN THE SUPREME COURT OF MONTANA

The rights of both Petitioner Hardy and Respondent Ivins in 14,980 acres of Federal permit lands under the provisions of the Taylor Grazing Act, § 315b (Title 43 U. S. C.) were considered at length in the proceedings in the trial court, (R. 244-266). The license in effect at the time of the trial in the district court was offered in evidence (R. Vol. 3, p. 335a) and provided that it was for a term of one year from April 1, 1955 to March 31, 1956 and further specified:

> "1. This license is void after final date noted above.
>
> 2. It is temporary and revocable.
>
> 3. It cannot be transferred or renewed except with approval of the Bureau of Land Management.
>
> 4. It is subject to revocation in whole or in part at any time upon the issuance of permits or for failure of the licensee to comply with the rules and regulations now or hereafter set forth by the Bureau of Land Management or for other reasons specified in the Federal Range Code for grazing districts. (43 C. F. R. Pt. 161)."

In the trial court it was brought out that while the partition purported to make two balanced units, Hardy had over six times as much Taylor Grazing acreage as Ivins (R. 159); that the licenses applying to Ivins and Hardy were temporary one-year licenses (R. 260, 261).

The right and privileges which Petitioner Hardy has in the Federal grazing lands under the Taylor Grazing Act was a matter of which the trial court and the Montana Supreme Court must take judicial notice, St. Louis, I. M. & S. R. Co. v. Starbird, 243 U. S. 592, 61 L. Ed. 917.

The matter of the confirmation of the Report of the Ref-

erees was submitted to the district court of Custer County on written briefs. Excerpts from the brief of petitioner Hardy showing that the contention was advanced that approval of the partition would result in a confiscation of property of the petitioner Hardy is set forth in the appendix. (infra appendix p. 35.)

In the Supreme Court of Montana, in the opening brief of appellant Hardy, the contention was advanced that approval of the proposed division of the ranch would deprive Hardy of property without due process of law, in violation of the Fourteenth Amendment. (appendix p. 36.)

This contention was reiterated in the Petition for a rehearing. (appendix p. 37.)

The dissenting opinion of Judge Loucks discusses both the federal question arising under the Taylor Grazing Act and the question arising under the Due Process Clause of the Fourteenth Amendment. (appendix pp. 24-27.)

ARGUMENT

CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE SUPREME COURT OF MONTANA IGNORES THE LEGAL EFFECT OF THE TAYLOR GRAZING ACT, AND DEPRIVES THE PETITIONER HARDY OF PROPERTY WITHOUT DUE PROCESS OF LAW.

The disregard of rights as determined by the Taylor Grazing Act and the alleged confiscation of property of petitioner Hardy by virtue of the decision of the Montana Supreme Court are inextricably interwoven.

Hardy and Lyins jointly had grazing privileges on the Federal lands, which could be withdrawn at any time by the

United States without payment of compensation. United States v. Cox (C. C. A. 10) 190 F. (2d) 293, Cert. denied 342 U. S. 867, 96 L. Ed. 652.

The use of Federal range under the Taylor Grazing Act is dependent on ownership of the "base properties" by the licensee. Sellars v. Kirk (C. C. A. 9) 200 F. (2d) 217; Cert. denied, 73 S. Ct. 831, 345 U. S. 940, 97 L. Ed. 1366, 43 C. F. R. 161.7 (appendix p. 42).

The Taylor Grazing Act provides for the use of public range. The Federal Range Code, issued by the Secretary of the Interior is controlling to the exclusion of state laws. Hatahley v. United States, 351 U. S. 173, 100 L. Ed. 1065, 76 S. Ct. 745.

The purpose of the Taylor Grazing Act is to stabilize the livestock industry and to permit the use of the public range according to the needs and *qualifications* of the livestock operators with *base holdings*. Chournos v. United States, (C. C. A. 10) 193 F. (2d) 321, Certiorari denied; 72 S. Ct. 1074, 343 U. S. 977, 96 L. Ed. 1369.

The inequality in the allotment of deeded lands results principally from the way Federal Taylor Grazing lands were treated.

The ranch includes 14,890 acres of federal land under the jurisdiction of the Secretary of the Interior.

The referees purported to assign deeded lands additional value by reason of federal grazing rights on adjacent lands.

However, in fact, the Referees allotted only 2,178 acres of federal permit land to Respondent Ivins and six times more, or 12,712 acres of the Federal permit land to Peti-

tioner Hardy and treated 75% of the carrying capacity of the permit lands as property.

If each co-owner had been awarded equal acreage in permit lands, or permit lands of equal carrying capacity, no disparity would result.

However when petitioner Hardy is allotted six times as much permit lands as Respondent Ivins, and the permit land is treated as having a value to Petitioner Hardy equal to seventy-five per cent of the value of deeded lands of equal carrying capacity allotted to him, the federal Statute is ignored and we contend that he is deprived of property without due process of law.

Our contention that the judgment conflicts with an Act of Congress is supported by the dissenting opinion of Judge Loucks (appendix pp. 24-27), who pointed out that the referees could not lawfully partition the lands held under Taylor Grazing Permit; that the record did not disclose that the fee lands as partitioned by them were the commensurate base lands for the respective federal permit lands which the referees recommended for allotment to the respective parties, and that the referees should not be permitted to assume that will be done which they were forbidden to do, and arbitrarily add 75 per cent of the value of the permit lands recommended for allotment to one of the parties, to the estimated value of adjoining fee lands allotted to that party, when they could not lawfully partition the permit lands.

In assuming that the federal permit lands would be so divided, the joint rights of both petitioner Hardy and Re-

spondent Ivins under the Act of Congress were ignored. Sec. 315b Title 43 U. S. C. (appendix p. 40).

THE PARTITION APPROVED DEPRIVES PETITIONER HARDY OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Our position that Hardy is deprived of property without due process of law is succinctly stated in the dissenting opinion of Judge Loucks as follows: (334 P. (2d) 721) (appendix p. 24-27).

> "The majority opinion approves a confiscation of property of the appellant Hardy and denies the appellants' rights secured to them under the due process clause of the State Constitution, Const. Art 3, § 27 and the Fourteenth Amendment to the Constitution of the United States." * * *
>
> Plaintiff Ivins and defendant Hardy each admittedly owned an undivided one-half interest in 107,362.97 acres of deeded land. They likewise had equal rights to revocable grazing privileges on 14,890.25 acres under permit from the Federal Government. The referees recommended that the permit lands be allotted 2,178.24 acres to Ivins and 12,712.01 acres to Hardy. Thus Hardy was charged with a dollar valuation of $43,464.24 on account of federal permit lands recommended for allotment to Hardy in excess of the permit lands recommended for allotment to Ivins. Hardy's share of deeded land is thus proportionately decreased and Ivins' share is increased.
>
> To give to these revocable grazing privileges a value equivalent to 75 percent of the value of lands of equal carrying capacity owned in fee and then to allot six times as much of this permit land to Hardy as is allotted to Ivins, effects a confiscation of property of Hardy without due process of law.

The majority opinion of the Montana Supreme Court is predicated upon the erroneous assumption that if the stock ranch in question is divided into two units of equal carrying

capacity, a partition that is fair and equitable has been accomplished.

The petitioner contends that the nature of the title or rights of each party in the lands awarded to him, must be examined before it can be ascertained whether or not an equitable partition has been effected.

The purported award of revocable grazing privileges upon a tract of land, in payment for which the party must surrender his fee ownership in other lands, is not equitable, and is unjust. Hayne v. Gould (D. C.) 54 Fed. 963, 969.

To arbitrarily assume that the permit lands would be divided as recommended by the Referees and then to assume that the revocable privilege of using the federal lands adds the value of 75% of their carrying capacity to the adjacent lands owned in fee, we submit, constitutes an arbitrary fiat contrary to the known facts, and not the result of a process of reasoning, essential to due process. Joint Anti-Fascist Refugee Com. v. McGrath, 341 U. S. 123, 95 L. Ed. 817, 71 S. Ct. 624.

The action of the Referees, approved by the Supreme Court of Montana, we submit, takes from the Petitioner Hardy his undivided one-half interest in land which he owned in fee, assumes he will receive a temporary revocable license to use government lands in lieu thereof and thereby deprives him of property without due process of law. Konigsberg v. State Bar of California, 353 U. S. 252, 1 L. Ed. 2d 810, 77 S. Ct. 722.

In Brown v. Mississippi, 297 U. S. 278, 80 L. Ed. 682, this

Court said: "The due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'."

It is recognized that a decision of a state court cannot be regarded by the unsuccessful party as a deprivation of property without due process of law simply because it denies his claim of ownership.

Here, rights to the Taylor Grazing lands, under an Act of Congress are involved. The petitioner's ownership of land in fee is taken from him, but it is fallaciously asserted that he is reimbursed by the "recommended allotment" to him of uncertain revocable grazing privileges to the Taylor Grazing lands not subject to partition. We submit that a deprivation of property occurs without due process of law, resulting from the arbitrary exercise of power inconsistent with the settled usages of the common law. Tracy v. Ginzberg, 205 U. S. 170, 51 L. Ed. 755, 27 S. Ct. 461.

A violation of the Federal Constitution by the decision of the Montana Supreme Court is involved, which gives this court jurisdiction to review the decision on certiorari. Coppenweld Steel Company v. Individual Commission, 324 U. S. 780, 89 L. Ed. 1363.

In determining what is due process of law, regard must be had to substance and not to form. A judgment of a State

Court which effects a taking of property without compensation to the owner is a denial by that state of a right secured to the owner by the Fourteenth Amendment. Chicago B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. Ed. 979, 17 S. Ct. 581.

The decision approving the Referees' Report by the majority of the Supreme Court could not have been reached without taking into account the rights of the parties under the federal Taylor Grazing Act. Accordingly, this court may properly review the Judgment of the State Court. Murray v. Charleston, 96 U. S. 432, 24 L. Ed. 760; Enterprise Irrig. Dist. v. Farmers Mut. Canal Co., 243 U. S. 157, 61 L. Ed. 644, 37 S. Ct. 318.

CONCLUSION

It is respectfully submitted that questions of substantial importance are presented by this case. The giving of revocable grazing privileges under the Taylor Grazing Act a value equal to seventy-five percent of the value of deeded land, and to arbitrarily take from petitioner Hardy his fee interest in lands and state that he has been compensated by being afforded revocable grazing privileges on government lands not subject to the control of the State indicates a disregard of the rights of licensees in Taylor Grazing lands, and a construction of the law of partition in Montana, in violation of the Fourteenth Amendment to the Constitution of the United States. Myles Salt Co. v. Bd. of Commissioners, 239 U. S. 478, 60 L. Ed. 392, 36 S. Ct. 204.

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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Helena, Montana,
Attorney for Petitioners.

F. F. HAYNES,
Forsyth, Montana,
ARTHUR P. ACHER,
Helena, Montana,
of Counsel.

APPENDIX

No. 9651

OCTOBER TERM, 1958

EULA MAY IVINS, as Executrix of the Will of R. L. Ivins, Deceased and EULA MAY IVINS,

Plaintiffs and Respondents,

vs.

ROBERT F. HARDY and MARY J. HARDY, his wife, MILES CITY BANK, a State Banking Corporation; and ARTHUR T. McINTOSH, Individually and as Trustee,

Defendants and Appellants.

ARTHUR P. ACHER,
WELLINGTON D. RANKIN,
Helena, Montana, and

F. F. HAYNES, Forsyth, Montana,
argued orally for Appellants.

HOWARD A. JOHNSON,
Butte, Montana, argued orally for Respondents.

Submitted March 18, 1958
Decided November 21, 1958
Filed November 21, 1958
Edna J. Hinman, Clerk

Mr. Justice Castles delivered the Opinion of the Court.

This is the third appeal taken by Robert F. Hardy, defendant and appellant throughout, in the actions brought by R. L. Ivins, plaintiff, and in each appeal the respondent, seeking an accounting from Hardy and a termination of their joint venture in the purchase and the operation of a large ranching property, owned equally by them. From the date the properties were first acquired, Hardy has occupied the ranch buildings and has managed all or a part of the holdings.

The original purchase was made September 20, 1938. Since then the jointly owned deeded lands, with adjoining state grazing leases and federal grazing permits have been substantially expanded, at times by Hardy in his sole name, although the ownership is joint and although the venture has been continuously in litigation since December 20, 1944. Generally speaking the decisions in the first two appeals have been for Ivins, the plaintiff and respondent, and against Hardy, the defendant and appellant. But the present is the third appeal, the accounting has still to be made, the properties are still undivided, and briefs of counsel assume the end is not yet.

The interest of the plaintiff is now represented by Eula May Ivins, his widow, appearing as his executrix. In the present suit, which continues the demand for money accounting and asks for a decree partitioning and setting off the properties, other parties have been joined with defendant Hardy. But here, as before, Hardy is the principal defendant and principal appellant, and will be treated as such.

For convenience, Ivins will be treated as plaintiff and respondent, rather than his executrix, who has been substituted for him.

Upon the first appeal this court affirmed the trial court's decision that the enterprise for the acquisition and operation of the L O Ranch and other ranch properties was a joint venture. The lower court's order requiring an accounting by Hardy and ordering a sale of the ranch personal property was sustained, but its order for the sale of the real property was reversed. Ivins v. Hardy, 120 Mont. 35, 179 P. 2d 745, decided April 15, 1947.

The second appeal was taken from the trial court's judgment on the accounting ordered in the prior appeal, including a money award to Ivins of $24,000. This court affirmed that judgment on April 3, 1950. Ivins v. Hardy, 123 Mont. 513, 217 P. 2d 204.

The present action was then brought by Ivins for the termination of the tenancy in common in the real property and for an accounting of all monies collected by Hardy, including the value of his use of the lands since January 1, 1948. An amended complaint in this present action was filed in Custer County district court April 17, 1951. The present and third appeal grows out of that complaint. Specifically, the third appeal is from the trial court's interlocutory decree confirming a referees' report proposing a division of the ranch between the joint owners.

Despite the protracted course of litigation, and the objections which were made by counsel in advance of the hearing, "just for the record," it must be borne in mind that the

interlocutory decree here appealed was entered pursuant to a stipulation between counsel for all parties which, among other things, provides:

"That all of the above lands, permits and leases are owned and held by the plaintiff, R. E. Ivins, and by the defendant, Robert F. Hardy, as tenants in common each owning an undivided one-half interest therein.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said lands are so situated that the same can be partitioned and divided between the respective co-owners and that a partition thereof, according to the respective rights of the co-owners, is hereby ordered, and for that purpose a Board of three referees shall be appointed by the court to make such partition and division."

Likewise, it must also be borne in mind that the decree here appealed was entered pursuant to a further stipulation between counsel for all parties that the decree in part above-quoted should be amended as follows:

"That whereas said Interlocutory Decree directs the commissioners on partition to partition and divide the parties' lands described as the lands held under Taylor Grazing Permits, that said provision be annulled and the following substituted therefore: 'The Commissioners are advised that lands held under Taylor Grazing Permits are not subject to partition and division as such, but the Commissioners are entitled *to give such consideration to said lands as being adjoining or adjunct to lands held in fee by either party* as they may decide *said lands will contribute, if anything, to the value of the lands held in fee* which are subject for di-

vision, *or that are leased* for a term of years'." Emphasis added.

The foregoing, by stipulation of all counsel, are the basic instructions on which the referees were directed to bring in a report for approval or disapproval by the district court. These stipulations recognize that the properties in dispute could be divided in kind. They also recognize that the value of the deeded lands and the increase in their value by the leases on the adjoining state grazing lands was further increased by the value of the permits on the Taylor Grazing Act lands within the public domain but adjoining the lands jointly owned by the parties and the state lands on which they jointly owned grazing leases.

On March 30, 1955, two of the referees, Simpson and Allen, filed a report allocating certain lands to the plaintiff, and other lands to the defendant. On April 4, 1955, the third referee, Mitchell, filed a separate report recommending a different division of the lands. On June 15, 1955, referees Simpson and Allen filed a supplemental statement explaining in detail the basis for their recommended partition. Subsequently, on December 12, 1955, the court entered its interlocutory decree approving this report. It is from this decree that the present appeal is taken.

The supplemental statement of the referee's report contained the following explanation:

"The animal units for a ten month period on the sections above mentioned with the asterisk [certain hay lands] were arrived at according to the number of tons of hay per acre as we estimated would be produced in an average year

over a period of time The average winter feeding period in this area being about 2 months we calculated the animal units for 60 days and translated it into 10 month period, reason being to simplify our report. Figuring the average weight of a cow, calf and yearling as being 700 lbs. and that it required 2% of an animals weight to sustain such weight for a period of sixty days, thus giving the complete operation for one year.

"It is our judgment that natural hay land would produce 1 ton per acre, therefore, it would require 2 acres of natural hay land to carry one animal ten months. We further calculated and allowed three acres per animal unit on developed hay land and four acres of potential hay land."

The referees' report was confirmed and adopted by the district court after hearing testimony of all appraisers and of numerous witnesses for the contending parties whose testimony shows honest difference of opinion but complete familiarity with the lands and with livestock operations in the rea. The testimony and cross examinations reveal that all appraisers are men of integrity and experience, eminently qualified for the extremely difficult task they accepted under the stipulations of all parties and that the report the district cofirt confirmed was made using "the formula as set up in Extension Circular 204, revised by 1949 State Land Reclassification for Taxation Purposes in Montana by the Extension Service of Montana State College" in an attempt to "set up a partition that would divide the ranch into two balanced units for a twelve-month carrying on of operations." Asked "What was that break-down? Explain it to the court?" one of the referees testified:

"A. Well, if it was strictly a grazing section, it was listed as a grazing section with the mark of the code [detailed code devised by the appraisers for their own convenience under the state Extension Service formula] that I was following on the township and, consequently, in the report. If it was land with hay meadow or potential hay meadow development, it was listed, too, that way on the plats and in the report. The reason for doing this is only arrived at from practical observations. If you attempt to purchase or become the operator of range land, your first consideration is to whether there's a possibility of improving it for increased carrying capacity.

"Q. Now, if I understand you and understand the partition correctly, that was considered upon the animal-carrying-capacity basis? A. Yes, sir.

"Q. Not an acre-to-acre basis? A. No, sir."

The discount of 25 per cent in the estimated carrying capacity values attributed to the leased state lands and the federal permit lands, arising by reason of their non-fee ownership, was explained by one of the referees in answer to a question asked by the trial judge, as follows:

"Q. * * * will you state to the court your reasons for arriving at the 75 per cent evaluation? A. Yes, it was from our knowledge of the entire ranch property holdings that, animal unit for animal unit, they practically have the same values—I mean by that the Taylor land and the deeded land, or the State land—but because the operator or owner of the title land doesn't have complete control of the Federal or Taylor land, Judge, or the State land, we discounted

that fact 25 per cent and gave 75 per cent of valuation of each animal unit designated on a Taylor permit plan and a State plan as being contiguous to the deeded land involved * * * I think the first element to consider in the Taylor land is to its, how it is situated or put in within the deeded land and to what assurance the operator may have in continuing to keep his [animal] permit from the [federal] Agency."

The report of the referees concludes with the following summary:

"A recap of the amount of property allotted to each party is as follows:

"To R. L. IVINS

	Acreage	Animal Units	% of Value Charged	Net Value
Deeded and contracted	54,352.40	1,593.48	100%	1,593.48
Deeded in lieu of interest in LO headquarters	1,280.00	34.00	100%	34.00
Federal	2,178.24	43.72	75%	32.81
State	3,200.00	80.00	75%	60.00
		Total		1,720.29

To: ROBERT F. HARDY:

Deeded and contract	51,730.57	1,370.19	100%	1,370.19
Federal	12,712.01	233.13	75%	174.85
State	5,445.76	142.00	75%	106.50
		Total		1,651.54"

Speaking in round numbers, the report confirmed by the district court gives Ivins 55,600 deeded acres and 5,000 acres of state leases and federal permits. It gives Hardy 51,700 deeded acres, the headquarters buildings, and 18,000 acres of leases and permits. The differential is the relative estimated carrying capacity and the award to Hardy of

$20,800 value in headquarters buildings and improvements. It should be added that the area awarded Hardy includes the same area he had taken and long occupied exclusively for himself.

The over-all area is better than 200 square miles of hay meadow and range pasture. In the language of the Powder River Country, the old "160" is now a "3,500 cow spread." It is worth a million dollars. But to a livestock operator, a ranch is what it will produce. Reconciled in over-all carrying capacity and including allowance for headquarters values allowed to Hardy, the net difference between the total award to Ivins and the total award to Hardy, when translated into animal units, is three quarters of one cow.

In passing, we should note that the present appeal involves no mineral titles. By stipulation, each of the parties reserved an undivided one-half interest in these. Also we should note that respondent's motion to dismiss this appeal on the ground that an interlocutory order is not appealable was abandoned during argument. This motion, therefore, requires no discussion in this opinion, as do the abandoned objections to the report and supplement made prior to hearing in the district court. See In re Murphy's Estate, 13 Mont. 353, 116 P. 1004, Ann. Cas. 1912C, 380; City of Philipsburg v. Weinstein, 21 Mont. 146, 53 P. 272.

In the interlocutory order here appealed, the trial court found that the report was filed by the referees, C. M. Allen and Milton Simpson, together with their supplemental statement, is supported by the testimony adduced at said hearing and that the partition and allotment of the several

portions as set forth therein, considering the quality and quantity, is a fair and equitable division thereof." The trial court also found that the different division recommended by the third referee, W. A. Mitchell, was not sufficiently supported by the evidence and testimony.

What evidence of land values, if any, the referees received is not shown; but the record does show that no evidence of land values was offered by appellant at the hearing in which appellant objected to respondent's motion to adopt the referees' report. The record shows that the referees examined the property, "each making his own notes and estimates of the production of said lands." The property involved is a stock ranch. The referees valued it in carrying capacity or "animal units," treating the entire holdings as a single livestock ranching operation. As instructed by agreement of the litigants in the supplemental stipulation, they assigned to the deeded lands and to the lands under state grazing leases, additional value by reason of federal grazing permits issued in the joint names of Ivins and Hardy on federal (Taylor Grazing Act) lands "adjoining or adjunct" the deeded and the state leased lands.

Neither party questions that the values of the deeded properties and of the leased state grazing lands are enhanced by the values contributed to them by the "adjoining or adjunct" federal grazing range. That contiguous federal range increases the value of deeded base holdings is elementary to the economy of western livestock ranching. The principal dispute is over the values assigned, state grazing leases being renewable but at going prices at time of renewal, and Taylor Grazing Act privileges on the public domain being

annual seasonal permits but with no preference rights except those accorded by federal administrative regulations and being withdrawable at any time without payment of compensation.

Against the argument that this impermanence of renewal price on state lands and this uncertainty of any renewal of public domain permits materially discounts the values of such grazing to the adjoining base landowner, respondent asserts that in practical experience the federal permits are taken as permanently renewable in the permittee who controls the adjacent base properties. This assertion was substantiated in the district court by competent evidence, but appellant replies that a revocable annual permit is still no right.

Query, then, is the proposed division just or is it unjust, and was it confirmed by the district court in error or in sound discretion? That the report was made under stipulations to which both sides agreed is undisputable, and that the report of referees is to be rejected only for reasons which justify the reversal of a jury's verdict is settled law. Ivins v. Hardy, 123 Mont. 513, 217 P. 2d 204.

That the report confirmed by the trial court is objectionable as a "majority report" was not seriously urged on appeal. The report the court confirmed is *the report*. A "minority report" of referees is as great an anomaly and as little consolation as a "minority verdict" of a jury.

As was stated for the full court in the opinion on the last prior appeal, Ivins v. Hardy, 123 Mont. 513, supra at 518:

"Appellant questions the right of Ivins to a money judgment as allowed by the trial court [$24,009.72].

"The rule is that a report or findings of a referee when approved and adopted by the trial judge 'will be treated as unassailable if there is any substantial evidence to sustain them.' In re Lunke, 56 Mont. 226, 182 P. 126, 127; In re McCue, 80 Mont. 537, 261 P. 341. See also, Stephenson v. Rainbow Flying Service, Inc., 99 Mont. 241, 42 P. 2d 735.

"As shown by the transcript and as found by the trial court; there was substantial evidence to support the referees' findings. In fact there was evidence, had the referees desired to follow it, which would have justified a much larger money judgment in Ivins' favor."

The appellant urges seven specifications of error, all directed to the proposition that the referees followed a prejudicially erroneous rule in concluding that the lands held by the parties under lease from the State of Montana or under permit from the federal government in the public domain were of a value to the one to whom such lands were awarded equivalent to 75 per cent of the value of lands owned in fee. As put by appellants:

"Nearly fifty-eight Thousand Dollars [$57,793.24] (using the referees' yardstick of animal units, converted into value in dollars using their value per animal unit) *which Ivins gets in deeded land*, Hardy gets only in revocable grazing privileges, for the continued enjoyment of which he must in addition pay rental for the use of the lands."

As shown above, the referees fixed a carrying capacity for each tract of land in animal units. Except with reference

to the headquarters improvements, this method was the sole method used throughout the division. It must be remembered that the property is jointly owned.

The referees valued the headquarters improvements at $20,800, allotted them to Hardy, and found Ivins' half of this to be the equivalent value of 34 animal units. Thus, in this one instance, the referees' report ascribes a value of $305.88 to an animal unit. Two sections of land, 1,280 acres, were allotted to Ivins in lieu of his one-half interest in the headquarters improvements. But all other carrying capacity calculations are in terms of animal units without reference to dollar values.

The appellant has seized upon this particular figure to justify his assertion that the lower court's order approving a referees' report which allots 55,632.40 acres of deeded land to Ivins as an equivalent of 1,627.48 animal units gives Ivins dollar values of $489,993.58, and further to assert that allotting 51,730.57 acres of deeded land to Hardy as an equivalent of 1,370.19 animal units give Hardy dollar values of $419,278.14. Thus appellant contends that the division of deeded lands favors Ivins over Hardy by $70,715.44 in dollar values. By the same method of calculation appellant further asserts that the "total [additional] valuation charged against Hardy in excess of that charged against Ivins *on account of State and Federal lands* [is] $57,793.24." Emphasis added. In summary, this is an assertion that the referees' report euchres Hardy out of over $128,000 in dollar values. Using appellant's special approach, and taking the referees' figures piecemeal, this would appear at first glance to be the result. However, as we have pointed out, the ref-

cress undertook their problem under agreed stipulations and their net final differentiation in the carrying capacity is exactly three quarters of one cow.

If the arbitrary figure of $305.88 per animal unit is applied to the 1,719.54 animal units allowed overall to Hardy, plus the 1,720.29 animal units allowed over-all to Ivins, this three quarters of a cow difference comes to $229.41.

To all practical intents and purposes, the dollar values allotted by the referees' report are equal. We come then to a consideration of whether or not the 75 per cent valuation placed on the permit lands as "adjoining or adjunct" to the deeded lands and the lands held under state grazing leases is borne out by substantial testimony, and, as a part of this, whether or not the so-called "potential" values were erroneously used.

At first blush we might observe that a figure representing the value of permit lands as equal to 75 per cent of the value of deeded lands does not appear equitable. However the record reveals, and we are aware of the fact, that valuation of purely livestock producing ranches (exclusive of mineral values and other commercial values) is based upon what they will produce. The Legislature has recognized the animal unit method of valuation. The state land board is authorized to determine the rental value of state grazing lands on an animal unit basis. R. C. M. 1947, § 81-401.

What is the nature of a referees' report? R. C. M. 1947, § 93-6319, in part provides:

> "In making partition the referees must divide the property and allot the several portions thereof to the

respective parties, quality and quantity relative considered, according to the respective rights of the parties as determined by the court, pursuant to the provisions of this chapter * * *"

R. C. M. 1947, § 93-6321, provides:

"The referees must make a report of their proceedings, specifying therein the manner in which they executed their trust, and describing the property divided, and the shares allotted to each party, with a particular description of each share."

R. C. M. 1947, § 93-6322, in part provides:

"The court may confirm, change, modify, or set aside the report, and if necessary appoint new referees. Upon the report being confirmed, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive: * * *"

In Field v. Leiter, 16 Wyo. 1, 50, 90 P. 378, 390, 391, 125 Am. St. Rep. 997, the Wyoming Court discussed a somewhat similar problem as follows:

"The well-settled rule is that the action of commissioners in partition will not be set aside on the ground of unequal allotments, except in extreme cases — as where the partition appears to have been made upon wrong principles, or where it is shown by very clear and decided preponderance of evidence that the partition is grossly unequal. The report of commissioners in this class of cases is regarded at least as conclusive as a verdict of a jury upon a trial at law, and will not be disturbed except upon grounds similar to those on which a verdict may be vacated and a new trial granted. Indeed, the rule is maintained by some courts that it is to be regarded with more favor than a verdict, for the reason that the commissioners are usually selected by the parties because of their superior judgment and capacity to perform this particular service, and are authorized to exercise their personal knowledge and to act upon a view of the property. (Freeman, § 525.) In New Jersey it was said: 'Where a partition has been actually made by commissioners, the court, by its well-settled

practice, interferes with their action with great reluctance. It is only where a clear mistake has been made that their proceedings will be interfered with.' (Bentley v. Long Dock Co., 14 N. J. Eq. 480." See also Ivins v. Hardy, supra, 123 Mont. 513; Wilkerson v. Wilkerson, 169 Okla. 232, 36 P. 2d 935, 937; and 40 Am. Jur., Partition, § 81, p. 68.

Both parties agree that the report of commissioners is regarded at least as conclusive as a verdict of a jury and should not be disturbed except upon grounds similar to those on which a verdict may be vacated and a new trial granted. The appellant states his view of the issue herein involved as follows:

"The Referees failed to follow the statutory direction which had been given to them to divide the property and allot the several portions, quality and quantity relatively considered. They apparently assumed that they must make a division line, with one person's land on one side of the line and the other person's land on the other side of the line. This we submit is not the law. The fee lands could have been divided. Perhaps it was more convenient to give to each man contiguous lands, but apparently that could not be done, quantity and quality relatively considered. The Referees ignored the Order of the Court and the statute.

"We have cited the decision of this Court * * * to the effect that if a jury disregards a specific instruction, a new trial should be granted.

"Our whole case is based on the contention that the Referees ignored the statute, ignored the Order of the Court, and endeavored to divide the ranch into two parts, treating the Taylor Granzing Lands as if they were owned in fee."

As previously related, the interlocutory order was amended by stipulation and agreement. If the referees followed the instructions contained in the stipulated order, the appellants cannot be heard to complain. We have previously quoted the pertinent portion of their instructions.

We cannot hold that the report of the referees makes any division of either the state grazing lands or of the federal lands under grazing permit. The stipulated instructions did not so allow, and there was no land ownership in either party to be divided. The report of the referees clearly shows an attempt to apportion equitably the advantages the grazing on these lands contributed to the jointly owned deeded base holdings, as the instructions stipulate. The record indicates that from the time Hardy occupied the ranch premises he resided in the headquarters buildings, which are on the northerly side of the premises, and that for a considerable time Hardy has used the northerly portion of the ranch and Ivins has used the southerly portion. The referees' division of the deeded lands worked out to follow the division of the ranch already tacitly observed by the parties. In consequence, each party was allotted state grazing leases and federal grazing permits on lands adjoining or adjunct to the base lands allotted to him. Any other allocation would have been unrealistic, and it would have nullified or tended to nullify the values the leases and permits contribute because federal grazing permits are issued with reference to the permittee's base holdings. As one of appellant's own witnesses testified:

"It [a Taylor Grazing Act permit] is allocated this way. If I have, for instance, a section sitting here, this man bor-

ders here, I border it on two sides, I get it. If he borders it on two sides, he gets it." Additionally, the record shows that much of the state leased land and the federal permit land is not only adjoining or adjunct to the deeded land, it lies within it.

Appellant objects that the referees based their report in part on "potential valuations" and argue that some of the hay-lands were treated as "in production." Examination of the referees' report does not sustain the objection. The report shows calculations were made on these, among other figures:

Developed hay land	3 acres per animal unit
Dry farm land	5 acres per animal unit
No. 3B grazing land	37 acres per animal unit
No. 3 grazing land	30 acres per animal unit
No. 4 grazing land	40 acres per animal unit
Natural hay land	2 acres per animal unit

"30 acres potential hay land at 4 a [acres] per A [animal] U [unit]".

Potential is a prospect; production is a fact. But here taking the potential as a fact, and as pointed out by respondent, the point in dispute involves a difference of only 3 per cent of the 3,496.52 animal units involved in the computation.

This contention, that potential values and the 75 per cent valuation in the grazing lands as adjunct to the deeded lands, is grossly unequal and made on wrong principles may not be accepted in the absence of some strong showing of gross inequality or use of wrong principles. We find difference of opinion, but no showing in the testimony such as would warrant our reversing the order of the district court which adopted and confirmed the referees' report.

Appellant stresses the federal condemnation case of United States v. Jaramillo, 190 F. 2d 300 (10th Cir. 1951), where judgment for a rancher owning, as here, deeded lands with state grazing land and federal grazing permit lands adjoining was reversed. Appellant takes the position that this case is authority for reversing the Custer County district court and for ordering the appointment of new referees. But the error in the Jaramillo case was in the jury's considering the separate value of the permit land within the public domain, which Jaramillo did not own, in reaching a verdict awarding damages in condemnation. The court recognized that grazing permits on the public domain do enhance the value of the adjoining or adjunct base-deeded land, stated with approval: "The jury was further instructed, however, that on the date of the taking of the lands, Mr. Jaramillo did have a grazing permit for 48 head of cattle, and that the jury should take that fact into consideration in determining the value of the fee lands and state lease, *giving to the fee land and the leased land such added value as in its judgment should be given on account of the availability and accessibility of the permit land.*" Emphasis added. The court's opinion further states: "In determining the adaptability of the lands as a ranch, it was therefore proper to take into consideration the availability and accessibility of the permit land as an appurtenant element of value for ranching purposes, provided that consideration is also given to the possibility that the permits could be withdrawn or cancelled by the Government at any time without constitutional obligation to pay compensation therefor."

This principle is the principle underlying the 75 per cent

evaluation and the 25 percent discount over-all equally applied to the parties. The percentages are not what the appellant desires. They may very well be other than this court would adopt if examining the properties originally as referees appointed by a district court. But in the absence of any substantial showing of gross inequality or the use of wrong principles in the referees' report, the confirming order of the district court must stand. On appeal, the report of the referees may not be re-refereed for lesser reasons.

As the Wyoming court observed in Field v. Leiter, 16 Wyo. 1, supra, at p. 49:

> "* * * the commissioners appear to have been men of large experience, long personal acquaintance with most of the lands, and possessing a general knowledge of the character, usefulness and value of lands located as these lands are. * * * It is reasonable to suppose in a matter of this kind and magnitude that the commissioners were selected because of their experience and knowledge as well as their reputation for fairness.
>
> "The conflict upon the evidence concerning the values in controversy is so pronounced that there would seem very small ground for assurance that the vacation of the proceedings and another reference to the same or different commissioners would result in harmonizing in any material degree the contrary opinions of those competent to speak upon the subject. The fact is well known that the honest views of equally fair and capable persons will often differ more or less widely regarding the value of real estate."

Following this the Wyoming court recites the rule as to gross inequality or use of wrong principles, which we quoted at the outset of this opinion, and which also appears in the last Ivins v. Hardy appeal, likewise cited, supra.

Our problem is with the equality of the whole partition rather than with the *prima facie* inequality of any of its

parts. The presence or the absence of adjoining, adjunct or contiguous lands under state grazing leases and under federal grazing permits is by common knowledge a basic factor in the economy of the livestock raising west. Our legislature has recognized the animal unit basis for calculating value. To ranchers, the value of a livestock producing property is the value of the livestock it will produce.

While counsel for respondent has argued that only two of appellant's objections are now properly before this court, we have nevertheless carefully examined all specifications of error. Justice requires no less.

This joint venture in the ownership of these livestock ranching properties was undertaken by Ivins and Hardy some nineteen years ago. During the last thirteen years the owners have been in litigation. The period for which the present action seeks accounting is now entering its second decade. With the Wyoming court, we must say that "the honest views of equally fair and capable persons will often differ more or less widely regarding the value of real estate." Nevertheless, absent wrong principle, and absent evidence preponderantly showing that the partition is grossly unequal, a report of referees must be confirmed by the district court; whereupon "judgment must be rendered that such partition be effectual forever." R. C. M. 1947, § 93-6322.

For the reasons stated, the interlocutory decree of the district court is affirmed.

WESLEY CASTLES,
Associate Justice.

We concur:

JAMES T. HARRISON,
Chief Justice.

HUGH R. ADAIR,
Associate Justice.

Mr. Justice Angstman and District Judge Loucks, sitting in place of Justice Bottomly disqualified, dissenting:

We think the inequality of the majority report of the referees is so pronounced that the trial court ought not to have approved it.

The report awarded 12,712 acres of Federal Taylor Grazing land to defendant and 2,178 acres to plaintiff.

It awarded 54,352 acres of deeded land to plaintiff and 51,730 acres to defendant.

The Federal Taylor grazing lands carry only grazing privileges for which a rental must be paid. These privileges are revocable and dependent for their duration upon the unpredictable action of Congress.

If it were proper to consider the value of the Taylor grazing land, a proposition denied in United States v. Jaramillo, 190 F. 2d 300 (10th Cir. U. S. C. A.), we cannot believe that they are worth 75 percent of the value of deeded land as a majority of the referees found. One of the referees who filed a minority report evidently disagreed with that procedure. Many witnesses testified on the subject and some placed the valuation as low as 10, 15, 20, 25 and 30 percent instead of 75 percent. One witness for plaintiff placed the value at 50 percent. The entire question of what would be a proper percentage contribution to the value of deeded lands could be eliminated by dividing the land so that each party would receive substantially the same number of acres of deeded land and substantially the same number of acres of Taylor grazing land, reasonable allowances to be

made of course for the different character of the land, if any.

It is true that division, giving exact acreage to each party, may not be possible or even desirable. But when the discrepancy in acreage given to each is as great as that here, it lacks the equality of treatment which the law and equity favors.

We think that a more equitable acreage division should be made or if that is not feasible, then resort should be had to section 93-6348, R. C. M. 1947, and equality of treatment be achieved by awarding compensation by one party to the other.

We see nothing in the stipulation that binds defendant to the award here made or to the procedure followed in reaching that award.

ALBERT H. ANGSTMAN,
Associate Justice.

JACK R. LOUCKS,
District Judge.

On Petition for Rehearing,

Cause No. 9651, Ivins v. Hardy.

District Judge Loucks, dissenting:

I joined with Mr. Justice Angstman in a dissent, from the majority opinion. I wish to record my dissent from the order denying appellants' petition for a rehearing.

The majority opinion approves a confiscation of property of the appellant Hardy and denies the appellant's rights secured to them under the due process clause of the State Constitution and the Fourteenth Amendment to the Constitution of the United States.

The affirmance of the interlocutory decree of the district court approves acts of the referees on partition which, in my opinion, were in violation of the Act of Congress of June 28, 1934, (43 U. S. C. A. 315, et seq.) known as the Taylor Grazing Act and the federal regulations issued pursuant to that Act.

The referees could not lawfully partition the lands held under Taylor Grazing permits and they were so instructed by order of the district court.

Section 3 of the Taylor Grazing Act (43 U. S. C. A. 315b) provides in part:

> "The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees. * * * So far as consistent with the purposes and provisions of this chapter, grazing privileges recognized and acknowl-

> edged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this chapter shall not create any right, title, interest or estate in or to the lands."

Regulation 43 C. F. R. 161.7 provides:

> "A transfer of a base property, whether by agreement, operation of law, or testamentary disposition, will entitle the transferee, if otherwise properly qualified, to all or to such part of a license or permit as is based on the property transferred, and the original license or permit will be terminated or decreased by such transfer."

The Regulation 43 C. F. R. 161.2 defines the priority period as the 5-year period immediately preceding June 28, 1934, and requires the Federal range to have been used with the base land or water during that period.

The base lands must be commensurate. Thus 43 C. F. R. 161.6 (c) (1) provides:

> "No license or permit will be issued to any applicant unless he is able to show that he possesses adequate feed to support his licensed or permitted livestock during the period of time for which they are to be off the Federal range."

The record does not disclose that the fee lands as partitioned by them were the commensurate base lands for the respective federal permit lands which the referees recommended for allotment to the respective parties.

There is nothing in the record to show that the Federal Grazing lands recommended for allotment to Hardy would be transferred to him alone.

Whether the permit lands could actually be allotted as the referees recommended under the federal statute and regulations is a matter entirely beyond the control of the referees.

The referees should not be permitted to assume that will be done which they were forbidden to do. That is, they may not appraise the permit lands upon the animal unit basis, recommend the allotment of the permit lands, and then arbitrarily add 75 percent of the value of the permit lands recommended for allotment to one of the parties to the estimated value of adjoining fee lands allotted to that party when they cannot lawfully partition the permit lands.

In arbitrarily adding to the value of fee lands a separate and independent value of permit lands, the referees adopted an illegal method of evaluation condemned in many cases where questions of value were involved. *United States v. Jaramillo*, 190 F. 2d 300 (10th Cir. 1951); United States v. Meyer, 113 F. 2d 387 (7th Cir. 1940); Morton Butler Timber Co. v. United States, 91 F. 2d 884 (6th Cir. 1937); Atlanta Terra Cotta v. Georgia Ry. & Electric Co., 132 Ga. 537, 64 S. E. 563.

Plaintiff Ivins and defendant Hardy each admittedly owned an undivided one-half interest in 107,362.97 acres of deeded land. They likewise had equal rights to revocable grazing privileges on 14,890.25 acres under permit from the Federal Government. The referees recommended that the permit lands be allotted 2,178.24 acres to Ivins and 12,712.01 acres to Hardy. Thus Hardy was charged with a dollar valuation of $43,464.24 on account of federal permit lands recommended for allotment to Hardy in excess of the permit lands recommended for allotment to Ivins. Hardy's share of deeded land is thus proportionately decreased and Ivins' share is increased.

To give to these revocable grazing privileges a value equivalent to 75 percent of the value of lands of equal carrying capacity owned in fee and then to allot six times as much of this permit lands to Hardy as is allotted to Ivins, effects a confiscation of property of Hardy without due process of law.

Due process of law means more than "due procedure." As the United States Supreme Court said in Oregon R. R. & N. Co. v. Fairchild, 224 U. S. 510, 524, 32 Sup. Ct. 535, 56 L. Ed. 863, 868:

> "For the guaranty of the Constitution extends to the protection of fundamental rights,—to the substance of the order as well as to the notice and hearing which precede it. 'The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation'."

JACK R. LOUCKS,
District Judge.

Mr. Justice Angstman:

Having disagreed with the majority opinion filed herein, I concur in the result stated by Judge Loucks in expressing disapproval of the order denying appellants' petition for rehearing.

ALBERT H. ANGSTMAN,
Associate Justice.

EXCERPTS FROM PROCEEDINGS IN TRIAL COURT

In the District Court of the Sixteenth Judicial District of the State of Montana, In and For the County of Custer.

R. L. IVINS and EULA MAY IVINS, his wife,

Plaintiffs,

vs.

ROBERT F. HARDY and MARY J. HARDY, his wife; MILES CITY BANK, a State Banking Corporation; and ARTHUR T. McINTOSH, Individually and as Trustee,

Defendants.

INTERLOCUTORY ORDER AND DECREE

* * *

IT IS ORDERED, ADJUDGED AND DECREED that the lands and premises involved in this action and subject to partition and division shall include all lands title to which is now vested in R. L. Ivins and Robert F. Hardy as appears from the records in the office of the County Clerk and Recorder of Custer County, Montana, and in the office of the County Clerk and Recorder of Powder River County, Montana, together with the lands title to which is now held in the name of Robert F. Hardy, also lands held under Taylor Grazing permits and leases issued to Ivins and Hardy or Robert F. Hardy and located within the boundaries and immediately adjoining said lands involved in this action and to be considered in the partition and division thereof are described as follows:

* * *

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said lands are so situated that the same can be partitioned and divided between the respective co-owners and that a partition thereof, according to the respect-

ive rights of the co-owners, is hereby ordered, and for that purpose a Board of three referees shall be appointed by the Court to make such partition and division.

* * *

Done this 27th day of September, 1954.

W. B. FLACHSENHAR,
Judge of the District Court.

Filed September 27, 1954.

(TITLE OF COURT)
(TITLE OF CAUSE)

ORDER AMENDING INTERLOCUTORY ORDER AND DECREE

Pursuant to Stipulation by counsel for the parties herein.

IT IS HEREBY ORDERED that the Interlocutory Order and Decree entered herein on September 27, 1954, be amended as set forth in the Stipulation of the parties dated January 17, 1955, which reads as follows:

"IT IS STIPULATED AND AGREED by and between counsel for the plaintiff, Howard Johnson, Butte, Montana; W. B. Leavitt, Miles City, Montana; and Chester E. Onstad, Broadus, Montana, and Counsel for the defendant Hardy, Farr & Farr, Miles City, Montana, and F. F. Haynes, Forsyth, Montana, that the Interlocutory Decree hereinbefore entered into in the above entitled cause pursuant to Stipulation on the 27th day of September, 1954, may be amended as follows: That whereas said Interlocutory Decree directs the commissioners or partition to partition and divide the parties' lands described as the lands held under Taylor Grazing Permits, that said provision be annulled and the following substituted thereof: "The Commissioners are advised that lands held under Taylor Grazing Permits are not subject to partition and division as such, but the Commissioners are entitled to give such consideration to said lands as being adjoining or adjunct to lands held in fee by either party as they may decide said lands will contribute, if anything, to the value of the lands held in fee which are subject for division, or that are leased for a term of years."

Dated this 17th day of January, 1955.

W. B. Leavitt,
Chester E. Onstad,
Howard A. Johnson,
Attorneys for Plaintiff.
Farr and Farr,
Fritz F. Haynes,
For Defendant."

Done in Chambers this 17th day of January, 1955.

W. B. FLACHSENHAR,
District Judge.

Filed January 18, 1955.

(TITLE OF COURT)

(TITLE OF CAUSE)

REPORT OF REFEREES SIMPSON AND ALLEN TO THE HONORABLE W. R. FLACHSENHAR, ONE OF THE JUDGES OF THE ABOVE ENTITLED COURT:

* * *

We hereby declare and allot the Northeast portion, as it appears on a map, to Robert F. Hardy and the Southwest portion to R. L. Ivins, the dividing line being described in the following manner:

Beginning at the Northwest corner of Section 30, 3N, 51E; extending South to the Northwest corner of Section 30, 2N, 51E; thence East to the Northeast corner of Section 29, 2N, 51E; thence South to the Southwest corner of Section 4, 1N, 51E; thence East to the Northwest corner of Section 7, 1N, 52E; and then South to the Southeast Corner of Section 5, 1S, 52E.

* * *

Completed and dated this 30 day of March, 1955.

Signed:
MILTON C. SIMPSON,
C. M. ALLEN.

Filed March 30, 1955.

(TITLE OF COURT)

(TITLE OF CAUSE)

SUPPLEMENTAL STATEMENT TO BE CONSIDERED IN CONNECTION WITH AND TO BE MADE A PART OF THE REPORT OF REFEREES MILTON C. SIMPSON AND C. M. ALLEN MADE AND FILED HEREIN ON MARCH 30, 1955, SHOWING THE BASIS UPON WHICH THE LANDS WERE THEREIN PARTITIONED AND ALLOTTED TO R. L. IVINS AND ROBERT F. HARDY, INCLUDING THE ANIMAL UNITS ALLOTTED TO EACH TRACT OF LAND WITH COMPUTATIONS, CALCULATIONS AND STATEMENTS EXPLANATORY THEREOF.

* * *

A recap of the amount of property allotted to each party is as follows:

	Acreage	Animal Units	% of Value Charged	Net Value
To: R. L. IVINS				
Deeded and contracted	54,352.40	1,593.48	100%	1,593.48
Deeded in lieu of interest in LO headquarters	1,280.00	34.00	100%	34.00
Federal	2,178.24	43.72	75%	32.81
State	3,200.00	80.00	75%	60.00
		Total		1,720.29
To: ROBERT F. HARDY				
Deeded and contract	51,730.57	1370.19	100%	1,370.19
Federal	12,712.01	233.13	75%	174.85
State	5,415.76	142.00	75%	106.50
		Total		1,651.54

Filed June 15, 1955.

Milton C. Simpson,
C. M. Allen.

* * *

(TITLE OF COURT)

(TITLE OF CAUSE)

INTERLOCUTORY DECREE APPROVING REPORT OF REFEREES ON PARTITION, FOR REFERENCE OF ACCOUNTING AND FOR ENTRY OF FINAL JUDGMENT.

* * *

IT IS ORDERED, ADJUDGED AND DECREED that the report of the referees C. M. Allen and Milton Simpson be, and the same is hereby, adopted, approved and confirmed.

* * *

Dated December 12, 1955.

W. R. Fluchsenhar,
District Judge.

Filed December 12, 1955.

IN THE SUPREME COURT OF THE
STATE OF MONTANA

R. L. IVINS and EULA MAY IVINS, his wife, No. 9651
Plaintiffs and Respondents,

vs.

ROBERT F. HARDY and MARY J. HARDY, his wife, MILES CITY BANK, a State Banking Corporation, and ARTHUR T. McINTOSH, individually and as Trustee,
Defendants and Appellants.

ORDER FOR SUBSTITUTION OF LEGAL REPRESENTATIVE ON SUGGESTION OF DEATH OF RESPONDENT, R. L. IVINS.

The death of respondent R. L. Ivins having been suggested in writing by respondent Eula May Ivins, and it appearing therefrom that the said R. L. Ivins has died, that his will has been duly admitted to probate, and that Eula May Ivins has been appointed as executrix of said will;

Now, therefore, it is hereby ordered that the said executrix be substituted as respondent in lieu of the said R. L. Ivins, deceased, and that the title of the above entitled cause be amended to show that the plaintiffs and respondents herein are Eula May Ivins, as Executrix of the Will of R. L. Ivins, deceased, and Eula May Ivins.

Dated this 26 day of August, 1957.

JAMES T. HARRISON,
Chief Justice.

Filed August 26, 1957.
Edna J. Hinman,
Clerk of Supreme Court,
State of Montana.

EXCERPTS FROM HARDY'S BRIEF IN TRIAL COURT

"The fee lands owned by Robert F. Hardy, under our system of law, belonged to him. No one could seize them without due process of law. He could mortgage them. He could sell them. He could pass them on to his heirs and there was none who could say to him, not even the Government itself, successfully, to whom he should sell them, mortgage them or give them. The Constitution of our country guaranteed his right in that respect.

Notwithstanding this the majority referees move over into the Taylor Grazing Act areas and using the exact standard of measure which they used on the fee owned lands, to-wit: animal units, allocated and assigned to Robert F. Hardy those Taylor Grazing Act areas and charged him with the full 100% of their value on their animal unit criteria less 25%." * * *

"It is not engaging in any rhetorical extravagance or exaggeration of the record or facts to direct the attention of this Court to the historical truth, that in the early part of the 12th Century the citizens and Barons of England rose in rebellion against the kind of philosophy which has been used in this case by counsel for the plaintiffs, and that a King of England was humbled and signed a Charter on a stump because his minions were inflicting upon the peasantry of England the exact penalties and oppressions and confiscations which they seek now to inflict upon Robert F. Hardy in attempting to give dignity and legal concord to the fallacious construction of the law of partition in the State of Montana as set forth in the Interlocutory Decree."

EXCERPTS FROM HARDY'S OPENING BRIEF IN MONTANA SUPREME COURT

Pages 43-45

It is respectfully submitted that if the majority report of the referees as approved by the district court were affirmed, it would amount to a confiscation of the property of the Appellant Hardy without due process of law.

In Chicago etc. Ry. Co. v. Board of R. R. Com., 76 Mont. 305, 318, 247 Pac. 162, the court said:

> "Where property is sought to be taken under an administrative regulation the defendant must not be denied the right to show that, as a matter of law, the order is so arbitrary, unjust and unreasonable as to amount to a deprivation of property in violation of the Fourteenth Amendment. (Chicago M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. Ed. 970, 3 inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462 (see also, Rose's U. S. Notes); Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. Rep. 418; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 173, 44 L. Ed. 420, 20 Sup. Ct. Rep. 336) (Fairchild Case, supra; Mont. Const., Art III, sec. 27)."

In Washington ex rel, Oregon R. & N. Co. v. Fairchild, 224 U. S. 510, 56 L. Ed. 863, 868, it was stated:

> "For the guaranty of the Constitution extends to the protection of fundamental rights,—to the substance of the order as well as to the notice and hearing which precede it. 'The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.'"

No. 9651

IN THE SUPREME COURT
OF THE STATE OF MONTANA

* * * *

EULA MAY IVINS, as Executrix of the Will of R. L. Ivins, Deceased and EULA MAY IVINS,

Plaintiffs and Respondents,

vs.

ROBERT F. HARDY and MARY J. HARDY, his wife, MILES CITY BANK, a State Banking Corporation; and ARTHUR T. McINTOSH, Individually and as Trustee.

Defendants and Appellants.

* * * *

PETITION FOR REHEARING

* * * *

Come now the defendants and appellants and petition the Court for a rehearing upon the following grounds and for the following reasons:

1. That facts material to the decision were overlooked by the Court.

2. That a question decisive of the case submitted by counsel was overlooked by the Court.

3 That the decision is in conflict with controlling statutes and decisions to which the attention of the Court was not directed.

4. That affirmance of the interlocutory decree of the District Court amounts to a confiscation of property of the appellants Robert F. Hardy and Mary J. Hardy, in violation of the following Constitutional provisions:

(a) Sec. 27 of Art. III., Constitution of Montana, which provides as follows:

> "No person shall be deprived of life, liberty, or property without due process of law."

(b) Sec. 3, Art. III., Constitution of Montana which provides as follows:

> "All persons are born equally free, and have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties, of acquiring, possessing and protecting property, and of seeking and obtaining their safety and happiness in all lawful ways."

(c) Amendment 14 to the Constitution of the United States which provides in part as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

F. F. HAYNES,
WELLINGTON D. RANKIN,
ARTHUR P. ACHER,
Attorneys for Defendants and Appellants.

Filed: Jan. 6, 1959.
Thomas J. Kearney,
Clerk of the Supreme Court,
State of Montana.

IN THE SUPREME COURT OF THE
STATE OF MONTANA

NO. 9651.

IVINS v. HARDY

ORDER

Appellants' petition for rehearing herein is hereby denied.
DONE this 19 day of January, 1959.

James T. Harrison,
Chief Justice.

Hugh Adair,
Wesley Castles,
Associate Justices.

Filed: Jan. 19, 1959.
Thomas J. Kearney,
Clerk of the Supreme Court,
State of Montana.

FEDERAL STATUTE

Extracts from the Act of June 28, 1934 as Amended, (48 Stat. 1270 as amended Aug. 6, 1947, 61 Stat. 790, 43 U. S. C. A. § 315b).

43 U. S. C. A. Sec. 315b provides in part:

"The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees. * * *"

"Such permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons for use." * * *

"So far as is consistent with the purposes and provisions of this chapter, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or *the issuance of a permit pursuant to the provisions of this chapter shall not create any right, title, interest or estate in or to the lands.*"

STATE STATUTES

Section 93-6319 R. C. M. 1947 provides in part:

"In making partition the referees must divide the property and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, pursuant to the provisions of this chapter, * * *"

Section 93-6321 R. C. M. 1947 provides:

"The referees must make a report of their proceedings specifying therein the manner in which they executed their trust, and describing the property divided, and the shares allotted to each party, with a particular description of each share."

Section 93-6322 R. C. M. 1947 provides in part:

"The court may confirm, change, modify or set aside the report, and if necessary appoint new referees. Upon the report being confirmed, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive: * * *"

Section 81-4702 R. C. M. 1947 provides in part:

"'Animal unit' means one cow, one horse, five sheep or five goats.

'Carrying capacity' shall mean the number of animal units which a given tract of land will support for a twelve (12) month period.

'Animal-unit-month' shall mean that amount of natural feed necessary for the complete subsistence of one cow for a period of one (1) month."

43 C. F. R. § 161.7 (1)

"A transfer of a base property or part thereof, whether by agreement, operation of law, or testamentary disposition will entitle the transferee, if qualified under § 161.3 (a), to so much of the grazing privileges as is based thereon. In any event the original license or permit will be terminated or decreased to the extent of such transfer."

43 C. F. R. § 161.2 (k) (1)

"'Land dependent by use' means forage land other than Federal range of such character that the conduct of an economic livestock operation requires the use of the Federal range in connection with it and which, in the 'priority period,' was used as a part of an established, permanent, and continuing livestock operation for any two consecutive years or for any three years of such priority period in connection with substantially the same part of the public domain, now part of the Federal range. The priority period shall be the five-year period immediately preceding June 28, 1934. * * *."

43 C. F. R. § 161.6 (e)

"* * * The issuance and continued effectiveness of all regular licenses and permits will be subject to the following terms and conditions: * * *

(f) The possession or control by the applicant, licensee, or permittee, of feed and forage supplies adequate, with the authorized Federal range use, to support his licensed or permitted livestock for a full year-round operation."

FILE COPY

Office Supreme Court, U.S.
MAY 11
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958
No. 845

ROBERT F. HARDY and MARY J. HARDY, his wife, MILES CITY BANK, a State Banking Corporation; and ARTHUR T. McINTOSH, Individually and as Trustee,

Petitioners,

vs.

EULA MAY IVINS, as Executrix of the Will of R. L. IVINS, Deceased and EULA MAY IVINS,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Montana

BRIEF OF RESPONDENTS IN OPPOSITION

HOWARD A. JOHNSON,
First National Bank Building,
Butte, Montana,
Attorney for Respondents

KEITH P. JOHNSON,
Butte, Montana,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958
No. 845

ROBERT F. HARDY and MARY J. HARDY, his wife, MILES CITY BANK, a State Banking Corporation; and ARTHUR T. McINTOSH, Individually and as Trustee,

Petitioners,

vs.

EULA MAY IVINS, as Executrix of the Will of R. L. IVINS, Deceased and EULA MAY IVINS,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Montana

BRIEF OF RESPONDENTS IN OPPOSITION

HOWARD A. JOHNSON,
First National Bank Building,
Butte, Montana,
Attorney for Respondents

KEITH P. JOHNSON,
Butte, Montana,
of Counsel.

JURISDICTION

The petitioners invoke the jurisdiction of this Court in certiorari under 28 U. S. C., §1257, subdivision (3), with specific reference to a statute of the

United States, namely the Taylor Grazing Act (43 U. S. C. §§315 to 315r, inclusive), and to the Fourteenth Amendment to the Constitution of the United States.

Under the jurisdictional provision cited petitioners must show that the state court judgment does at least one of two things: either that it draws in question the *validity* of the Taylor Grazing Act, or that *without due process of law* it deprives them of some title, right, privilege or immunity under that Act which they *specifically set up or claimed* in the state courts by timely action.

QUESTIONS PRESENTED

Two questions are actually presented. The first is jurisdictional. The substantive question is this:

Where the parties stipulate that in the partition of a stock ranch the referees shall give consideration to any values deemed added to fee title lands by adjoining lands held and used under permits under the Taylor Grazing Act, and the referees' report is made in accordance with the stipulation, is a party deprived of property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution, by the decision of a state's highest appellate court finally affirming the trial court's decree adopting the referee's report?

Neither question fully appears from the petition, which completely overlooks the stipulation, but the substantive question is fully disclosed by the decision against which the petition is directed (Petition, Appendix 2-21).

Under the heading "Question Presented," the petioners propound three questions. In each they ignore their stipulation which the referees' report, the trial court's decree and the state supreme court's decision followed. In the first they indicate that values contributed by adjoining permit land were considered with reference only to petitioners' land and not to that of respondents. In the first and second they assume, contrary to the record, that the decision treats the permit land as "allotted" or "assigned" to the parties, or "in effect partitions" the permit land. In the third they correctly concede that the referees did not *allot*, *assign* or *partition* the permit land, but merely *recommended* and *assumed* that the permit land held in common by both parties would be allotted to the recipient of the adjoining fee title land, in accordance with the Taylor Grazing Act, the regulations and established practice thereunder as shown by the record, and as assumed in their stipulation. Their third question is whether, by such recommendation or assumption, the petitioners, who would receive the beneficial use of the majority of the permit land, would thereby be *illegally* deprived of their one-half interest in the minority of the permit land.

Petitioners' first reference to the Fourteenth Amendment appears in their petition for rehearing. Their first reference to the matters mentioned in their other two questions appears in their petition to this Court. None of their three questions tendered herein was submitted to the state courts; none of them was decided by the state courts.

STATEMENT OF THE CASE

Petitioners' statement of the case is inadequate and somewhat at variance with the facts; but the decision of the Supreme Court of Montana amplifies and corrects their statement in most respects. It is necessary to examine the record to determine when, if ever, a federal question was raised in the state court proceedings.

The district court pleadings consist of amended complaint (R. 1), amended answer (R. 18) and reply to amended answer (R. 25). They are in much the usual form for partition proceedings in the code states and raise or suggest no federal question. They were supplemented and amended by several stipulations, which likewise raise or suggest no federal question.

When the cause came on for trial upon the pleadings the parties presented a stipulation (R. 32ff) agreeing (R. 33):

> "That *the lands and premises* involved in this action and *subject to partition and division shall include* all lands, title to which is now vested in R. L. Ivins and Robert F. Hardy, * * * *lands held under Taylor Grazing permits* and leases issued to the parties "*within the boundaries and immediately adjoining said lands.*"

On September 27, 1954, the court rendered its interlocutory order and decree, reciting the stipulation and in accordance therewith ordering partition of the lands including those held under Taylor Grazing permits.

On November 24, 1954, the parties filed their stipulation, dated November 10, 1954 (R. 44-48), pro-

viding for the appointment of three referees "*to make a partition and division of the lands* owned by the plaintiff, R. L. Ivins, and the defendant, Robert F. Hardy, *together with the* leases and *grazing permits* held and used by both or either of the parties in connection therewith" (R. 44-45). On the same date the court made an order appointing referees to make such partition. It directed them in accordance with the stipulation, including the instruction pursuant to Section 93-6320 of the Revised Codes of Montana of 1947 (R. 47) that they should "locate the share of each cotenant so as to embrace as far as practicable the improvements made" by him and to disregard such improvements in valuing the land.

On January 17, 1955, the parties filed another stipulation (R. 52), providing as follows:

> "That the Interlocutory Decree hereinbefore entered into in the above entitled cause pursuant to Stipulation on the 27th day of September, 1954, may be amended as follows: That whereas said Interlocutory Decree directs the commissioners on partition to partition and divide the parties lands described as the lands held under Taylor Grazing Permits, that said provision be annulled and the following substituted therefor: "The Commissioners are advised that *lands held under Taylor Grazing Permits are not subject to partition and division as such, but the Commissioners are entitled to give such consideration to said lands as being adjoining or adjunct to lands held in fee by either party as they may decide said lands will contribute, if anything, to the value of the lands held in fee which are subject for division*, or that are leased for a term of years."

On the same day the district court made an order

(R. 53-54) amending its interlocutory decree of September 27, 1954, in accordance with the latter stipulation, which it quoted in full.

On March 30, 1955, the referees, acting by majority thereof in accordance with Montana statute (Section 19-101), filed their report (R. 54-61) partitioning the lands owned in fee and stating (R. 55):

> "We wish to make the following recommendations: * * * (2) that the Federally owned land administered by the Bureau of Land Management now under individual allotment to R. L. Ivins and Robert F. Hardy or to Robert F. Hardy and within the boundaries of or immediately adjacent to, be given an individual allotment to the respective owner as by this partition designated."

Their report allotted to petitioner Robert F. Hardy the northern part of the ranch, which he had chosen to occupy and improve (R. 151, 152, 163-164); it included also the original homestead improvements, approximately five-eighths of the leased state land, and approximately six-sevenths of the land held by permits under the Taylor Grazing Act.

On April 4, 1955 the dissenting referee filed what petitioners call a "minority report" (R. 61-71) in which he identified the lands as he would have allotted them, and also the state leased lands and the federal permit lands which "would be adjacent to the lands allotted" to each party (R. 66, 70).

On June 15, 1955, the referees by majority action filed their "supplemental statement to be considered in connection with and to be made a part of the report of referees, Milton C. Simpson and C. M. Allen made and filed herein on March 30, 1955, showing

the basis on which the lands were partitioned and allotted * * *". In it among other things they identified the "Taylor Grazing lands held under permits issued by the Bureau of Land Management and recommended for individual allotment" to the parties (R. 75, 78).

On July 18, 1955, the respondents' motion for adoption of the referees' report came on for hearing in the district court. The three referees agreed that the permit lands added values to the dependent or base lands which they adjoined, but the dissenter advocated an allocation of only 20%, or a discount of 80%, of the carrying capacity of the permit lands, instead of the allocation of 75%, or discount of 25%, decided upon by the other two referees (R. 172-3).

The Manager of the Miles City office of the Bureau of Land Management, in charge of some five million acres of government land in North Dakota, South Dakota and eastern Montana (R. 264) and with twenty years experience with the Bureau there and in Colorado (R. 245), testified that the control of base land controlled the permit land (R. 263-6) so long as the permit fees were paid, that the permits were virtually permanent (R. 248), and that in his twenty years of experience under the Taylor Grazing Act he knew of no permit revoked except for violation of regulation or disposition of base land (R. 254-5).

Petitioners did not testify. Their attorneys did not attempt to repudiate the stipulation, or to object that the agreed attribution of Taylor Grazing land values to the base land would in itself constitute a

deprivation of property without due process under the Fourteenth Amendment; their contention was that a 25% discount of the added values was too little (Petition; Appendix 35). In questioning petitioners' witnesses his attorney repeatedly asked "what would be the maximum percentage in your opinion, that should be allocated to any Taylor Grazing Act areas so used in determining its value to deeded lands, * * *?" (R. 212); "have you formed a conclusion as to the value that you would give to the holding of Taylor Grazing Act lands under permit as applied to your own lands?" (R. 234), and similar questions (R. 233, 238, 273-4, 276-7, 287, 297, 304, 309, 314, 318). His obvious purpose was to establish 20%, instead of 75%, as the value to be attributed, or to increase the discount from 25% to 80%.

The testimony, both by petitioners' and respondents' witnesses, was unanimous that considerable values were added to base land by the permit land.

Upon all the evidence the district court approved the referees' report by interlocutory decree of December 12, 1955 (R. 81), without any mention in recitals, finding, conclusions or decree, of any federal or constitutional question, but with reference (R. 82) to the stipulation authorizing the referees to find what values, if any, were contributed to base lands by permit lands.

In their brief on appeal to the state supreme court, the petitioners raised no federal or constitutional question. Their specifications of error were as follows (Brief 4-6):

"1. The Court erred in finding, holding and deciding that the partition and allotment of lands as provided for by Referees Allen and Simpson was a fair and equitable division thereof.

"2. The court erred in finding, holding and deciding that the report of referees Allen and Simpson should be adopted, approved and confirmed.

"3. The court erred in refusing to find that the report of Referees Allen and Simpson was based upon erroneous principles and should have been rejected.

"4. The court erred in overruling the objections of the defendant Robert F. Hardy to the adoption of the majority report of the Referees Allen and Simpson, which objections included the following:

> "'* * * that said Majority report clearly amounts in its effect to a partition and division contrary to the terms of the Interlocutory Decree in that it treats the fee-owned lands for the Taylor Grazing Act lands (sic.), which is contrary literally and in effect to the law of the case as set forth in the Interlocutory Decree, the powers of the referees being therein specifically confined and limited to the fixation of some contributory value which they might find that the adjacent Taylor Grazing lands used by the parties might add to the fee-owned lands' (Tr. 93).
>
> "'* * * that it has been arrived at contrary to the specific instructions to the referees by the Interlocutory Decree in that it is based upon fictitious or, as designated in the Majority Report, potential values, which is contrary to the law and contrary to the Decree' (Tr. 94).

"5. The court erred in confirming the report of Referees Allen and Simpson which failed to equit-

ably partition the State leased lands, quality and quantity relatively considered.

"6. The court erred in confirming the report of Referees Allen and Simpson which purported to partition Taylor Grazing lands contrary to the order of the court.

"7. The court erred in confirming the report of Referees Allen and Simpson which erroneously charges each of the co-owners with seventy-five per cent of the value of the Federal lands recommended for allotment to such party, on account of the recommended allotment of such Federal lands.

"8. The court erred in confirming the action of the referees in awarding the plaintiff Ivins two sections of land in lieu of his interest in the "L. O. Headquarters."

"9. The court erred in approving a partition which was based in part upon 'potential values' rather than upon actual values."

The only reference in that brief to confiscation of property was as follows:

> "It is respectfully submitted that if the majority report of the referees as approved by the district court were affirmed, it would amount to a confiscation of the property of the Appellant, Hardy without due process of law."

It came in the last two pages of the 45 page brief after the detailed argument of issues, and under the heading "Conclusion." It was not mentioned in the court's decision (Petition, Appendix 2), on the last page of which the court said (Appendix 21):

> "While counsel for respondent has argued that only two of appellant's objections are now prop-

> erly before this court, we have nevertheless carefully examined all specifications of error. Justice requires no less."

Thus no federal question was mentioned or decided by the state supreme court. The dissenting opinion (Appendix 22) made no reference to it.

The first such reference was in the petition for rehearing (Appendix 37), where it was stated as a fourth ground, in addition to the three grounds permitted by court rule.

The rules of the Supreme Court of Montana provide as follows (Rule XV 2):

> "A petition for rehearing may be presented upon the following grounds and none others: That some facts, material to the decision, or some question decisive of the case submitted by counsel, was overlooked by the Court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the Court was not directed."

In accordance with its practice the court on January 19, 1959, ruled upon the petition for rehearing without a further opinion, by an order merely stating that the petition "is hereby denied." (Appendix 39).

The only further reference in the record to any federal or constitutional question was by District Judge Loucks eight days later, in his so-called "dissenting opinion on order denying petition for rehearing." (R. 24-5).

In it he stated that the "majority opinion", apparently meaning the court's decision which was already in effect, approved the confiscation of petitioners' property and denied their rights under the due process clauses of *the state constitution* and the

Fourteenth Amendment for two reasons: first because he thought it approved acts of the referees which were in violation of the Taylor Grazing Act; and second, because he thought giving "a value equivalent to 75%" of the carrying capacity of permit lands to the allotted dependent or base lands effected a confiscation of Hardy's property without due process of law.

ARGUMENT

No Jurisdictional Ground Is Shown for Writ of Certiorari

This Court is without power to decide whether constitutional rights have been violated, where federal questions were not seasonably raised in accordance with requirements of state law. Edelman v. People, Calif. 1953, 344 U. S. 357, 73 S. Ct. 293, 97 L. Ed. 387.

Thus where the question was not raised in trial court the final appellate decision is not subject to review here (Chemical National Bank v. City Bank, Ill., 1896, 160 U. S. 646, 16 S. Ct. 417, 40 L. Ed. 568), especially where under the state practice the appellate court will not revise the judgment of the trial court on questions not therein raised (Louisville, etc. R. Co. v. Woodford, Ky. 1918, 234 U. S. 46, 34 S. Ct. 739, 58 L. Ed. 1202; Spies v. Illinois, 1887, 123 U. S. 131, 8 S. Ct. 21, 31 L. Ed. 80.)

The expression in 28 U. S. §1257, "where any title, right, privilege or immunity is specially set up or claimed under the Constitution," etc., has a settled meaning; namely, "that the claim must be asserted

at the proper time and in the proper manner by pleadings, motion or other appropriate action under the state system of pleading and practice, * * * and upon the question whether or not such a claim has been so asserted the decision of the state court is binding upon this Court, when it is clear * * * that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of federal right." Atlantic Coast Line R. Co. vs. Mims, S. C. 1917, 242 U. S. 532, 37 S. Ct. 188, 61 L. Ed. 476.

The federal right must be "specially set up or claimed under the Constitution, treaties or statutes of * * * the United States" (28 U. S. C. §1257 (3); Louisville etc. R. Co. v. Smith, Tenn. 1907, 204 U. S. 551, 27 S. Ct. 401, 51 L. Ed. 612. An inferential suggestion is not enough. "A mere claim in the court below that there has been a denial of due process of law does not of itself raise a federal question with sufficient distinctness to give us jurisdiction to consider whether there has been a violation of the Fourteenth Amendment." Thomas v. Iowa, 1908, 209 U. S. 258, 28 S. Ct. 487, 52 L. Ed. 782. The claim must be made unmistakeably and not by inference. Winona etc. Land Co. v. Minnesota, 1895, 159 U. S. 540, 16 S. Ct. 88, 40 L. Ed. 252.

A general statement that the decision of a court is against the constitutional rights of the objecting party or against the U. S. Constitution or Amendment 14, or that it is without due process of law, will not raise a federal question. Hamblin v. Western Land Co., Iowa 1893, 147 U. S. 531, 13 S. Ct. 353, 37 L. Ed. 267.

The constitutional clause or statute must be specified in the state court. Lawler v. Walker, Ohio 1852, 14 How. 149, 14 L. Ed. 364; New York Central etc., R. Co. v. New York, 1902, 186 U. S. 269, 22 S. Ct. 916, 46 L. Ed. 1158.

The proper way to raise a federal right is by pleading, motion, exception, or other action set forth in the record, showing that the claim was presented to the court. Loeb v. Columbia Tp., Ohio 1900, 179 U. S. 472, 21 S. Ct. 174, 45 L. Ed. 280.

It is the established law in Montana that questions not raised in the trial court by appropriate pleadings will not be considered on appeal (Milne v. Leiphart, 1946, 119 Mont. 263, 174 Pac. 2d 805), even if specified and argued (Western Montana Marble & Granite Co., v. Rhone, 1923, 69 Mont. 76, 220 Pac. 413), that the issues or theory raised by the pleadings connot be changed on appeal (Eakins v. Frank, 1898, 21 Mont. 192, 53 Pac. 538), that new or inconsistent grounds cannot be asserted on appeal (Flannery v. Campbell, 1904, 30 Mont. 172, 75 Pac. 1109), that the case will not be reviewed on a theory different from that on which it was tried below (Durfee v. Harper, 1899, 22 Mont. 354, 56 Pac. 528; Russell v. Sunburst Refining Co., 1928, 83 Mont. 452, 272 Pac. 998), that the theory on which the case was tried in the court below must be strictly adhered to on appeal, and that a party cannot there assume a position inconsistent with that in trial court (State v. Oakland, 1955, 129 Mont. 347, 287 Pac. 2d 39; Feeley v. Lacey, 1958, Mont. , 322 Pac. 2d 1104); and that a party complaining of error must

stand or fall upon the grounds relied on in the trial court (Bower v. Tebbs, 1957, 132 Mont. 146, 314 Pac. 2d. 731).

As shown by the record, the issues urged by petitioners here were not presented to the trial court by pleadings or otherwise; on the contrary, by the stipulation upon which they submitted the partition to referees and court they expressly authorized the acts which they now contend were contrary to the Taylor Grazing Act and constituted a confiscation of property without due process; by the stipulation they waived the objections which they now seek to assert.

The first and only reference in trial court to the federal Constitution is an excerpt from their brief filed in trial court after the referees' decision (Petition, Appendix 35). It said only that "the Constitution of our country guaranteed" petitioner Hardy's right to sell or mortgage his lands or pass them on to his heirs.

There was no reference to confiscation without due process or to the Fourteenth Amendment. With regard to Hardy and the permit lands the objection was that "the majority referees * * * charged him with the full 100% of their value on their animal unit criteria less 25%," and that in asking the adoption of the report respondents were "attempting to give dignity and legal concord to *the fallacious construction of the law of partition in the State of Montana* as set forth in the Interlocutory Decree."

Thus they were still talking about the question whether under Montana law the partition was a proper one. There was no suggestion that despite

the stipulation no allocation of permit land benefits could be made, but the entirely different one that the 75% allocation was too high, which is purely a question of state law.

But even if it had raised the federal question asserted here, it would have come too late; for the partition had already been submitted to the referees and accomplished by them according to the parties' agreement. Our system of jurisprudence does not permit parties to change their theories after the submission and decision of issues.

Furthermore arguments of counsel in state court form no part of the record. Gibson v. Chouteau, Mo. 1868, 8 Wall. 314, 19 L. Ed. 317; Sayward v. Denny, Wash. 1895, 158 U. S. 180, 15 S. Ct. 777, 39 L. Ed. 941; Mutual Life Ins. Co. v. McGrew, Cal. 1903, 188 U. S. 291, 23 S. Ct. 375, 47 L. Ed. 480, 63 L. R. A. 33. Certainly they do not frame issues, especially if contrary to those framed by the pleadings and agreements of the parties.

The alleged federal constitutional issue was not raised in the trial court; and it could not have been raised by any possible statement or argument of counsel, in the face of the stipulation, which clearly and finally waived it by agreeing that values added to fee land by permit land could be considered in the partition.

Even if the federal issue had been raised in trial court, it was waived on appeal, for it was not raised in the appellate court by any specification of error. It was not included in the eight specifications of error, as set forth above, concerning which, like the

stipulation of January 17, 1955, the petition is singularly silent.

It is well settled in Montana, by numerous decisions, that questions not raised by specifications of error in appellants' brief are waived, and that the Montana Supreme Court will consider only questions so raised by specifications. Schilling v. Curran, 30 Mont. 370, 76 Pac. 998; Rogness v. N. P. Ry. Co., 59 Mont. 373, 196 Pac. 989, Portland Cattle Loan Co. v. Featherly, 74 Mont. 531, 241 Pac. 322.

Thus, in the absence of a specification of error, even if a federal question had been raised in the trial court and argued on the appeal, it would not have been before the supreme court of Montana under the established law and practice.

As noted above, the only reference to a federal question in petitioners' appeal brief is made on page 36 of the Appendix; the reference cited appeared in the last two pages of a 45 page brief, under the heading "Conclusion."

If appellants' intention was to raise a federal question by this passing reference and without specification of error, the question was not recognized by the court; for as noted above, the court discussed no federal question, but at the end of its decision (appendix 21) emphasized that it had disposed of all specifications of error and added: "Justice requires no less."

The dissenting opinion does not mention any federal question as being before the court, nor complain that the decision ignored it. The only objections raised by the dissenters were these (Appendix 22):

"We think the inequality * * * is so pronounced

that the trial court ought not to have approved it."

* * *

"If it were proper to consider the value of the Taylor grazing land, * * * we cannot believe that they are worth 75 per cent of the value of deeded land * * *."

* * *

"* * * when the discrepancy in acreage given to each is as great as that here, it lacks the equality of treatment which the law and equity favors."

"We think that a more equitable acreage division should be made * * *."

* * *

"We see nothing in the stipulation that binds defendant to *the award here made* * * *."

It is apparent that they were still discussing the nonfederal question whether the partition was equitable. They were correct in stating that the stipulation authorizing the referees to give consideration to permit land did not bind defendants from objecting that they had given it such consideration that the particular "award here made" was inequitable. But they certainly cannot have meant that the agreement did not bind them from raising the federal question that no consideration whatever could be given to permit land, and that any such consideration ipso facto constituted confiscation without due process under the Fourteenth Amendment.

Obviously therefore, since neither the court nor the dissenters discussed any federal question, neither considered that any such question was presented.

The first, clear or specific mention of a federal

question was made in the petition for rehearing, and it was made in violation of court rule.

As noted above, the rule provides only three grounds for rehearing, none of which provides for then raising a new issue, federal or non-federal. Yet the petition stated the three grounds and added a fourth (Appendix 37) that the affirmance of the decree constitutes a confiscation of petitioners' property in violation of both Sections 3 and 97 of the Constitution of Montana and the Fourteenth Amendment to the Constitution of the United States.

In accordance with its practice, the court disposed of the petition for rehearing by an order merely stating that it "is hereby denied." There being no new decision there was nothing from which to dissent, but the district judge sitting in lieu of one of the justices filed what he called "my dissent from the order denying appellants' petition for a rehearing." (Appendix 24).

In it he does not state any reason why the motion should be granted, but refers to the new question first mentioned in the petition for rehearing.

He does not suggest that in denying the petition the court actually decided a federal question but refrained from mentioning it. In any event, where a decision does not show that a federal question was presented and decided, a statement by a judge that such question was decided is not sufficient to show federal jurisdiction. Charleston Federal Sav. & Loan Assn. v. Alderson, W. Va. 1945, 324 U. S. 182, 65 S. Ct. 624, 89 L. Ed. 857.

Admittedly, if the highest state court had actually

ruled upon a federal question, certiorari should be entertained, even if the federal question was not raised in the trial court, and was raised for the first time on petition for rehearing (Hill v. Smith, Mass. 1923, 260 U. S. 592, 43 S. Ct. 219, 67 L. Ed. 419), but not unless it is affirmatively shown that the court actually entertained and decided it (Susquehanna Boom Co. v. West Branch Boom Co., Pa. 1884, 110 U. S. 57, 3 S. Ct. 438, 28 L. Ed. 69; Montana v. Rice, 1907, 204 U. S. 291, 27 S. Ct. 281, 51 L. Ed. 490; Radio Station WOW v. Johnson, Neb. 1945, 326 U. S. 120, 65 S. Ct. 1475, 89 L. Ed. 2092; and numerous other decisions cited under 28 U. S. C. A. § 1257, n. 222). But a federal question cannot be assumed to have been raised and passed on in a state court so as to give jurisdiction to this Court when nothing appears on the record to show on what grounds the decision was made on the matter in which the federal question was allegedly involved. Caperton v. Bowyer, W. Va. 1871, 14 Wall. 216, 20 L. Ed. 882.

To confer jurisdiction upon this Court the record must affirmatively show, either that the question was raised as an issue in the trial court, or that it was nevertheless actually decided by the highest appellate court (Bailey v. Anderson, Va. 1945, 326 U. S. 203, 66 S. Ct. 66, 90 L. Ed. 3), and that its decision was necessary to the determination of the cause (Lynch v. People, N. Y. 1934, 293 U. S. 52, 55 S. Ct. 16, 79 L. Ed. 191; Whitney v. People, Cal. 1927, 274 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 1095.)

This court will not review a state court decision resting on adequate non-federal grounds (Young v.

Ragen, Ill. 1949, 337 U. S. 235, 69 S. Ct., 1073, 93 L. Ed. 1333), and has no jurisdiction to do so (Dixon v. Duffy, 1952, 344 U. S. 143, 73 S. Ct. 193, 97 L. Ed. 153); if it appears that the state court's decision might have rested upon a non-federal ground, this Court will not take jurisdiction to review it (Durley v. Mayo, Fla. 1956, 351 U. S. 277, 76 S. Ct. 806, 100 L. Ed. 1178); if the decision can be considered ambiguous, this Court will choose an interpretation which would not confront it with a constitutional question (Black v. Cutter Laboratories, Cal. 1956, 351 U. S. 292, 76 S. Ct. 824, 100 L. Ed. 1188).

We respectfully submit that the federal question here asserted was not presented to the trial court by any authorized manner or otherwise, nor decided by it; that it was not presented to the state supreme court in accordance with state court practice, or at any time before petition for rehearing; that it was not decided by that court, either by its decision or by its denial of the petition for rehearing; that it was not necessary to the determination of the cause; and that the decision was based entirely on adequate non-federal grounds.

ON THE ISSUES

1. THE VALIDITY OF A STATUTE IS NOT DRAWN IN QUESTION.

Petitioners state in their petition (14) that the decision approving the referees' report could not have been reached without taking into account the rights of the parties under the Taylor Grazing Act, and

that "accordingly, this Court may properly review the judgment of the state court."

28 U. S. C. § 1257 does not say *take into account rights* under a statute, but *draw in question the validity* of a statute. The two things are quite different.

The decision of the state supreme court did not draw in question the validity of the Taylor Grazing Act. A statute is not drawn in question every time rights under it are controverted or affected. (Kennard v. Nebraska, 1902, 186 U. S. 304, 22 S. Ct. 879, 46 L. Ed. 1175); Blackburn v. Portland Gold Min Co., Colo. 1900, 175 U. S. 571, 20 S. Ct. 222, 44 L. Ed. 276); the validity of a statute is drawn in question whenever the power to enact it is fairly open to denial, and is denied (Baltimore, etc., R. Co. v. Hopkins, 1889, 130 U. S. 210, 9 S. Ct. 503, 32 L. Ed. 908; Miller v. Cornwall R. Co., Pa. 1897, 168 U. S. 131, 18 S. Ct. 34, 42 L. Ed. 409).

2. DUE PROCESS OF LAW NOT IN ISSUE.

By "due process of law" is meant that which follows the general rule established in our system of jurisprudence for the security of private rights, is appropriate to the case, and just to the parties affected. It must be pursued in the ordinary mode prescribed by the law. It must be adapted to the end to be attained, and, wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. Hagar v. Reclamation District, 111 U. S. 701, 4 S. Ct. 663, 28 L. Ed. 569;

Marchant v. Pennsylvania R. Co., 153 U. S. 380, 14 S. Ct. 894, 38 L. Ed. 751.

Where parties to an action were fully heard in the state supreme court in the regular course of judicial proceedings, the court's reversal of a former decision to the prejudice of a party did not constitute the taking of his property without due process of law, in violation of the Fourteenth Amendment. Tidal Oil Co. v. Flanagan, Okl. 1924, 263 U. S. 444, 44 S. Ct. 197, 68 L. Ed. 382.

Certainly the same is true of any decision in an action not otherwise involving a federal question, which is unsatisfactory to a party because it does not give him all he desires. If that were not true, all state court decisions could be brought before this Court.

A decision of a state court upon a question of law cannot be reviewed in this Court as presenting a question of the violation of the Fourteenth Amendment merely because such decision is asserted to be wrong. Patterson v. Colorado, 1907, 205 U. S. 454, 27 S. Ct. 556, 51 L. Ed. 879, 10 Ann. Cas. 689.

Thus the decision of the state court concerning the application of a state statute is not open to review here, even though this Court might consider the particular application to be rather hard. Hartford Life Ins. Co. v. Blincoe, 1921, 255 U. S. 129, 41 S. Ct. 276, 65 L. Ed. 549.

It is clear from the record that petitioners had "due process," in spite of the fact that the referees, the trial court and the state supreme court did not give them precisely the desired result. A dissatis-

fied party may feel that he is deprived of property by an adverse judgment; but if he has been accorded his fair day in court he had not been deprived of it without due process.

Apparently realizing that fact, appellants here shift ground and assert (Petition 11-14) that the referees' consideration of values contributed to dependent or base land by permit land ipso facto deprived them of property because it reduced their allotment of fee lands and also deprived them of rights under the Taylor Grazing Act.

If so, it was not without due process, for petitioners were not only given the right to be heard in that regard, but affirmatively stipulated that it should be done. No other meaning can be assigned to the agreement that the referees were to "give such consideration" to the Taylor Grazing lands "as they may decide said land will contribute, if anything, to the value of the lands held in fee." They could give consideration to it only by correspondingly increasing the allocated values of the dependent base lands owned in fee. Obviously the one to whose allotment the most permit land values attached would to that extent receive a smaller fee land allotment. When the stipulation was made the petitioners knew that they would receive it by virtue of §93-6320 of the Montana Codes and their election to occupy and improve the north part of the ranch. If their desired 20% allocation of permit values had prevailed the arrangement would have paid off 5 to 1 in carrying values; the fact that it paid off only 4 to 3 is a matter of degree only, which raises only a state ques-

tion under the Montana partition statutes. Presumably that is why petitioners fail to mention the stipulation in their petition.

It is a non-federal question whether there was in effect a taking of petitioners' property by an unequal division. On the other hand if, as they now contend, there was a taking of their property merely because of the referees' consideration of the values added to dependent or base land by permit land and a consequent adjustment in the division of fee lands, it was not without due process; for it was with their agreement and consent.

CONCLUSION

We respectfully submit that there is here no jurisdiction in certiorari, because no federal question was presented to, or decided by, the state courts in the manner required by 28 U. S. C. § 1257, subd. (3) and the decisions of this Court, or in accordance with the rules, decisions and practice of the state supreme court.

We submit further that no substantive ground here exists for a writ of certiorari for the following reasons:

(1) That the state supreme court's decision does not draw in question a statute of the United States;

(2) That no title, right, privilege or immunity has been specially set up in the state court proceedings or denied by the judgment;

(3) That the petitioners expressly stipulated and agreed in trial court that the referees in partition should do what they now attack as depriving them

of property without due process, and thereby expressly waived the question now sought to be raised; and

(4) That insofar as petitioners' attack is upon the result reached by the referees rather than upon their compliance with the stipulation, a non-federal question is raised which is not properly before this Court.

For the foregoing reasons it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

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